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Supreme Court of the United States

OCTOBER TERM, 1965.

No. 344

MICHIGAN MUTUAL LIABILITY COMPANY, Insurance Carrier, and PITTSTON STEVEDORING CORPORATION, Employer,

Petitioners,

against

PHILIP F. ARRIEN, Deputy Commissioner Second Compensation District, Bureau of Employees Compensation, United States Department of Labor, and ISIDORO PARISI,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Supreme Court of the United States

OCTOBER TERM, 1965.

No.

MICHIGAN MUTUAL LIABILITY COMPANY, Insurance Carrier, and PETTSTON STEVEDORING CORPORATION, Employer, Petitioners,

against

PHILIP F. ARRIEN, Deputy Commissioner Second Compensation District, Bureau of Employees Compensation, United States Department of Labor, and ISIDORO PARISI, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners pray that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on April 5, 1965. Petitioners' petition for rehearing was denied by the Court of Appeals on April 29, 1965.

OPINIONS BELOW.

The opinion of the District Court appears in Volume I of the record certified by the Clerk of the Court of Appeals for the Second Circuit at pages 29(a)-44(a), and is reported in 233 F. Supp. 496. The opinion and dissenting opinion of the United States Court of Appeals for the Second Circuit (R.* 7a-22a) printed on pages 1b to 15b of

* The parenthetical page references preceded by "R." in this petition are to those pages in the appendix record certified by the Clerk of the Court of Appeals for the Second Circuit. Nine additional copies have been filed for consideration by this Court.

the Appendix hereto, is reported at 344 F. 2d 640. The denial of the petition for rehearing by the Court of Appeals (R. 31a-37a) is not yet reported (without opinion).

Grounds of Jurisdiction.

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered on April 5, 1965. A petition for rehearing was filed by petitioners on April 20, 1965, and it was denied on April 29, 1965.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 U. S. Code.

Questions Presented.

This case, arising under the Longshoremen's and Harbor Workers' Compensation Act, presents the question:

1. Whether a man injured while standing on a moveable platform or skid which is the extension of the working area of a pier, suffered his disability "from an injury occurring upon the navigable waters of the United States", as required by Section 3 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. Section 903(a).

The following questions are also presented:

2. Does the fact that a platform which is securely fastened to the stringpiece of a pier, which is used solely to extend the working area of the stringpiece and which is used on most piers in the harbor of New York for that sole purpose, lose its character as "an extension of the land" simply because it can be removed after the ship sails and be stored inside the pier shed?

3. May a compensation order be sustained on the ground that an injury, occurring on a skid or extension of the pier is within the purview of the "twilight zone"

cases, or on the ground that such an injury is within a "presumption of coverage" even if the coverage is sustained only on a misconceived legal precept and is contrary to all the evidence?

4. Did the Extension of Admiralty Jurisdiction Act of 1948 (46 U. S. C. A. 740) amend the Longshoremen's and Harbor Workers' Compensation Act so as to repeal the provision of said Act which unequivocally states that recovery can be had only for injuries occurring "upon the navigable waters of the United States" and to now provide that recovery under the Longshoremen's and Harbor Workers' Compensation Act may be had if the injury occurs within the admiralty jurisdiction?

5. Is the congressional intent to exclude from that Compensation Act injuries occurring on a wharf, pier or dock as an extension of the land and the decisions of this court holding that a moveable platform or skid is such an extension to be ignored or discarded on the basis of asserted "antiquarian value"?

Statutes Involved.

The statutory provisions involved in this suit are Sections 3(a), 20(a) and 21(b) of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, ch. 509, 44 Stat. 1424, as amended), Sections 903(a), 920(a) and 921(b) of title 33 U. S. C. A., which provide as follows:

> "§903. *Coverage.* (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *"

"§920. *Presumptions.* In any proceeding for the endorsement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter."

"§921. *Review of Compensation Orders.* (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, * * *"

and the Extension of Admiralty Jurisdiction Act (Act of June 19, 1948, Ch. 526, 62 Stat. 496), Section 740 of Title 46 U. S. C. A. which reads as follows:

"§740. *Extension of admiralty and maritime jurisdiction;* * * *

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: * * *"

Statement.

(1)

As the majority opinion of the Court of Appeals states: "Although the legal precepts are sharply contested, the basic facts are undisputed". Nevertheless, the basic "legal precept" advanced by Judge Kaufman is the metaphysical

notion that an extension of a dock, wharf, pier or similar situs is not an extension of land within the legislative intent to exclude injuries occurring on docks if the extension is "a temporary device", notwithstanding the character of both the permanent and temporary portion of the dock as a single "working platform". Under this concept, coverage would depend on the fortuity of the portion of the working area on which the injury occurred, a result hardly contemplated by Congress.

The statement of the Deputy Commissioner that the "working platform" is "similar to a gangway used for ingress from and egress to a vessel" is contrary to fact and no contention can be made that the expression is an actual fact. Indeed, the statement is wholly fanciful and is not supported by any evidence whatsoever. As the majority opinion stated: "The surface of the skid and stringpiece [the permanent part of the wharf] were about 20 to 25 feet below the deck and the skid was not used to board the vessel."*

The basic undisputed facts upon which the majority opinion is grounded are as follows:

On September 4, 1963, Parisi, a longshoreman employed by Pittston, was helping discharge cargo from the S.S. *Copiapo* at a pier in Brooklyn, N. Y. To provide additional and adequate working space for greater efficiency, the workers set up a "skid"—a removable wooden, rectangular platform, approximately six feet by ten feet—extending over the waters between the vessel and the wharf. The skid

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* Significantly, the Safety and Health Regulations for Longshoring of the Department of Labor, 29 C. F. R. Part 1504 defines the term "gangway" [Sub-part A 1504.3, (k)] as "any ramp-like or stair-like means of access provided to enable personnel to board or leave a vessel, including accommodation ladders, gangplanks and brows." Moreover, Section 1504.11 of Sub-part B of these regulations provides specific standards for "gangways" and for their certification and inspection.

was necessary because the wharf's narrow stringpiece did not extend far enough beyond the shed to permit the stevedores to walk around the unloaded pallets. Three angle irons secured the onshore side of the skid to the pier and cables shackled to two ring bolts on the offshore side were attached to stanchions on the pier shed. When not in use, the skid was easily dismantled and stored on the wharf. The surface of the skid and the stringpiece were about twenty to twenty-five feet below the deck and the skid was not used to board the vessel. A safety net or "saveall," loosely strung between the bulwark of the ship and the outer edge of the skid, served to catch any cargo that might fall.

Parisi was working on the skid when a pallet suspended from the *Copiapo's* cables broke, spilling a draft of cargo onto the skid and into the water. A bronze case struck Parisi's leg and knocked him into the water. Although saved from drowning by a fellow longshoreman, Parisi suffered totally disabling injuries to his shoulder, head, leg and foot. Treating the accident as though it had occurred on land, Pittston and Michigan Mutual commenced paying the maximum rate of compensation under the New York Workmen's Compensation Law—$55. per week. And when Parisi filed a claim for compensation under the federal Longshoremen's Act, 33 U. S. C. §901, et seq., they asserted that his only remedy was under the State Act. But the Deputy Commissioner, after a hearing, concluded that the Longshoremen's Act applied because the injury "was sustained upon the navigable waters of the United States." He then entered an award for $70. per week—the maximum rate of compensation payable under the Longshoremen's Act—during the continuation of Parisi's temporary total disability plus a lump sum of $630. to cover, retroactively, the difference between $70. per week and the $55. paid weekly under the State Act. This action, seeking judicial review of the administrative decision, followed.

The "legal precept" utilized to sustain coverage under the Longshoremen's Act (rather than under the New York Compensation Act) was arrived at by the following reasoning:

1. The earlier Supreme Court cases were only concerned with the reach of a state compensation act, and are therefore not to be followed in determining coverage under the Federal Act; and "In part because these decisions produced 'no reliable determinant of valid state law coverage,' *Calbeck* v. *Travelers Ins. Co.*, 370 U. S. 114, 118 (1962), Congress passed the Longshoremen's and Harbor Workers' Compensation Act in 1927."

2. A Senate Judiciary Committee considering the Federal Act noted that injuries occurring in loading or unloading are not covered unless they occur on the ship or "between the wharf and the ship", and thus a "temporary" extension of a wharf over navigable waters is not to be analogized to a wharf, but more closely to a gangway, simply because the extension is "temporary", even though it is actually an indivisible part of the pier as a working area.

3. To be an extension of land, the structure must permanently remove the water beneath it from navigation; apparently ignoring the striking example of bridges and similar extensions of land, including retractable bridge-like piers that are designed for the dual purpose of extending the land and permitting navigation thereunder, which have never been held to be anything other than an extension of land.

This reasoning is accompanied by the irrelevant statement that the Act applies to a gangway which is not even owned or kept on a ship, ignoring the fact that such a gangway has always been considered an extension of the ship and never an extension of the land whether or not removable.

4. The leading applicable decision of this court [*T. Smith & Son, Inc.* v. *Taylor*, 276 U. S. 179 (1928)]

holding that a skid, such as the one before the court, is an extension of land, and decisions following that holding are to be ignored as "outdated" and of "antiquarian value".*

5. Finally, the Court resolves the uncertainty of its absolute holding that a "temporary" extension of a pier is not within the coverage of the Act as a matter of law, by seeking refuge in Section 20(a) of the Act that presumes coverage "in the absence of substantial evidence to the contrary". This, without any findings of fact whatsoever by the Deputy Commissioner that would uphold such a presumption and without considering that Section 21(b) of the Act requires a compensation order to be suspended or set aside "if not in accordance to law". While the "twilight zone" cases are mentioned it is virtually impossible to consider them relevant to the factual context of this case, particularly since the *Colbeck* decision appears to have discarded this concept altogether as a determinant of coverage.

The dissenting opinion of Judge Hays notes in simple terms that an extension of a pier is regarded as part of the land within the meaning of the Act and an injury thereon cannot be an injury on "navigable waters", as contemplated by Congress; while a "gangway" has always been considered an extension of a vessel, and that these extensions may not be "analogized" by the utilization of a "temporary device" doctrine.

The majority opinion, in order to sidestep the true nature of the skid in question as an extension of the land, urges that cases involving questions of admiralty jurisdiction are not to be followed because this would, perforce, equate the application of the Act with Admiralty juris-

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* This is accompanied by the assertion of a metaphysical distinction between an extension of a pier that is "nailed and bolted", and an extension joined in a manner which would not require the removal of nails and bolts to separate it from the pier.

diction. Yet it is hardly necessary to equate coverage with Admiralty jurisdiction merely because their rationale excludes a skid from "navigable waters" within the Congressional intent expressed at the time of the enactment of the Longshoremen's Act. On the other hand, the opinion of the District Court urges that the Extension of Admiralty Jurisdiction Act of 1948 expanded the coverage of the Longshoremen's Act to an injury on a dock sustained from an object falling from a vessel.

Reasons for Granting the Writ.

1. *The holding that an injury occurring on a platform utilized solely to extend the working area of a pier is an "injury occurring upon the navigable waters" as required by the Longshoremen's and Harbor Workers' Compensation Act because the extension is not permanent and for that reason alone is analogous to a gangway, raises an important question of Federal law which should be settled by this court.*

Because the area of nearly every shedded pier in the United States is principally covered by the shed for protection of cargo, the working area left on its uncovered portion is so narrow that it is virtually impossible to load or unload cargo without the addition of an extension platform to expand the working area such as the skid in this case. Thus, the question of application of the Longshoremen's Act to an injury occurring on such a platform is of nation-wide importance in the longshore industry.

With the exception of the instant case, it has been uniformly held that wharves, piers and docks, whether resting on pilings or not, are extensions of the land and that remedies for injuries upon such structures are restricted to local law rather than admiralty law. The mere fact that a plat-

form which can be moved and stored inside the pier is used as an extension of the pier in order to enlarge its useful working area does not change the character of the pier or the platform. See *The Plymouth*, 70 U. S. 20 (1865); *Johnson* v. *Chicago & Pacific Elevator Co.*, 119 U. S. 388 (1886); *Cleveland Terminal and Valley Railroad Co.* v. *Cleveland Steamship Co.*, 208 U. S. 316; *State Industrial Commissioner* v. *Nordenholt Corp.*, 259 U. S. 263 (1922); *Smith & Son* v. *Taylor*, 276 U. S. 179 (1928); *Swanson* v. *Marra Brothers*, 328 U. S. 1 (1946); *American Export Lines, Inc.* v. *Revel*, 266 F. 2d 82 (4 Cir. 1959); *Hastings* v. *Mann*, 340 F. 2d 910 (4 Cir. 1965); *Benedict on Admiralty*, §29 page 64, 6th Ed.; Gilmore & Black, *The Law of Admiralty*, §6-46, page 339, 1957 Ed.

In a split decision, the majority of the Court of Appeals for the Second Circuit decided this case on the narrow ground that since the platform was removable and therefore did not permanently remove the area under it from navigation, it could not be considered or analogized to the wharf itself, despite the fact that the sole purpose of the skid was to permit the narrow stringpiece of the wharf to be safely and properly extended in order to load and unload cargo from ships alongside. It analogized the skid to a gangplank and reasoned that since both a gangplank and skid were not permanent structures, the waters under them were as navigable as they would be if a ship were moored in the same place.

But this analogy is misplaced; for a gangplank used as a means of ingress to and egress from a ship is far different from a skid which is used solely for the purpose of extending the working area of the pier. A gangplank is historically part of an extension of a vessel. *The Admiral Peoples*, 295 U. S. 649 (1935).

The words "*upon* the navigable waters" do not have the same meaning as "*over* the navigable waters". (See majority opinion R. 13a.) No court has ever held that in order to qualify as a wharf, dock or pier, the structure must have permanently removed from navigation the waters over which it has been built. Nor has any case held that such a facility is an extension of land because it is "built on pilings over what was navigable waters".

The mere fact that the skid did not permanently remove from navigation the waters underneath it is no test at all. The skid was used solely for the purpose of increasing the working area of the pier and the stringpiece; was not a means of ingress to or egress from the vessel (It was 25 feet below the deck of the ship) and when in position, it removed from navigation the waters beneath it just as effectively as did the pier itself.

There are many bridges in the harbors and rivers of the United States which, when in position for carrying traffic, completely or severely limit navigation of the waters beneath them. Many of these bridges can be raised, lifted or swung out of the way in order to permit free and unhampered use of the waters which then become as navigable as when the skid in the instant case is removed and stored inside the pier. As far as this writer knows, no case has ever decided, nor has anyone ever urged, that a workman injured on such a bridge would be within the coverage of the Longshoremen's Act.

The attempted analogy of the skid in this case to a gangway is erroneous and misplaced. Rather, the analogy of the skid to a bridge, which can be moved to permit free access of the waters beneath it, is closer.

2. *The decision of the Court of Appeals should be reviewed in the light of* Calbeck *v.* Travelers Ins. Co., *370 U. S. 114, 118 (1962) that a determination of whether or not an injury occurred upon "navigable waters" should not depend upon the coverage of a state statute, and whether the rate of compensation of that statute is lower or higher.*

The fact that fortuitously, the rate of compensation in the state where the injury occurred may be less than the rate prescribed by the Federal Statute is not a matter concerning liberal construction, for the construction must be the same in every state of the union, including such states as the newly created State of Hawaii, which has a higher rate. Such liberal construction is, indeed, in conflict with the rationale of the *Calbeck* case which cries out that the courts should no longer examine a state compensation act in determining what constitutes an injury occurring "upon the navigable waters".

3. *The holding that an injury occurring on an extension of a wharf that is an integral part of the working area is within the provision of the Longshoremen's and Harbor Workers' Act, because it is "temporary" is not in accordance with the applicable decisions of this court, which may not be rejected on the ground of asserted "antiquarian value".*

Confronted with the decisions of this Court in *Smith & Son* v. *Taylor,* 276 U. S. 179 (1928) and with the decisions of its own Circuit in *Vega* v. *United States,* 191 F. 2d 921 (2 Cir. 1951), cert. den. 343 U. S. 909 (1952) and *Jeffers* v. *Foundation Co.,* 85 F. 2d 24 (2 Cir. 1936) the majority of the Court was forced to discard these cases as only "of antiquarian value" and "inconclusive, as well as outdated". The *Smith* case is still good law and has been followed by

this Court and by intermediate Appellate Courts without being overruled. It is not of antiquarian value and it is not outdated.

4. *Congress clearly intended that the Act should apply only to injuries occurring upon the navigable waters of the United States. It specifically did not intend that the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act should be co-extensive with Admiralty jurisdiction.*

The original version of §3 of S-3170 reads:

> "This Act shall apply to any employment performed on a place within the Admiralty jurisdiction of the United States * * *."

The Act as finally passed provided that it should apply to "an injury occurring upon the navigable waters of the United States".

5. *This court in* Calbeck *v.* Travelers Insurance Company *370 U. S. 114 has eliminated any test based on the so-called "twilight zone" and obviously aimed at bringing more certainty to determining the boundary line between state and federal acts.*

The "twilight zone" theory enunciated in *Davis* v. *Department of Labor,* 317 U. S. 249 was extremely difficult to apply to particular fact situations since it provided no standard of measure of certainty by which to be guided. See Gilmore and Black, *The Law of Admiralty,* Sec. 6-49 et seq. 1957 edition; Norris, *The Law of Maritime Personal Injuries,* Sec. 136-137, 1959 edition. It seems quite clear that in *Calbeck,* Mr. Justice Brennan aimed at bringing more certainty in deciding this troublesome question and it

has restored the federal compensation and state compensation acts to the status of being mutually exclusive rather than overlapping. While it is true that the facts in the *Calbeck* case are different from the facts in the instant case, *Calbeck* has attempted to lay at rest the "twilight zone" and "local concern" theories and substitute therefor the easily and readily determinable theory which Congress intended in the first place, viz., injury occurring upon the navigable waters of the United States.

> "In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy. Section 3(a) should, then, be construed to achieve these purposes. * * *" (*Calbeck* v. *Travelers Insurance Company,* 370 U. S. 114, 124).

6. *The Admiralty Extension Act did not amend the Longshoremen's and Harbor Workers' Compensation Act to repeal the express provision that coverage applied only when the injuries occurred upon the navigable waters.*

Although urged to do so, Congress did not, nor intend, to extend coverage under the Act to land injuries. Mr. William F. Dempsey on behalf of the International Longshoremen Association urged that the bill be drafted to cover longshoremen even though they were injured on the dock (Senate Hearings, pages 26 and 27).

Mr. Lindley D. Clark for the Bureau of Labor Statistics similarly urged Congress to cover the entire operation of loading and unloading the ship.

> "There is control of the whole contract of loading, unloading, work on the dock, on the bridge, and on the ship, and it is the earnest desire of Commis-

> sioner Stewart that a bill should cover the contract, cover the job and not simply the man when he is on the ship." (Senate Hearings, page 40).

These urgings, however, were never realized; for Congress specifically deleted the original language of §3 which would have made the Longshoremen's Act applicable to cover employment within the admiralty jurisdiction and specifically restricted it to injuries incurred upon the navigable waters.

"Senate Report No. 973, 69th Cong., 1st Sess., at page 16 states:

> 'The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as "longshoremen." These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that *injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship* so as to bring them within the maritime jurisdiction of the United States. (emphasis supplied)."

Thus, it is clear that at least until the enactment of the Admiralty Extension Act, the Longshoremen's Act was restricted to injuries occurring upon the navigable waters and excluded any injuries inflicted on shore. *Swanson* v. *Marra Brothers, Inc.*, 328 U. S. 1, 7 (1946).

The Admiralty Extension Act expressly recognized the existence of land injuries as distinguished from injuries occurring on navigable waters and did not expressly or by implication strike down the distinction previously made by the Court and by Congress.

FIRSTLY: In the Longshoremen's Act, Congress specifically used the phrase "upon navigable waters" and discarded the phrase "admiralty jurisdiction".

SECONDLY: The Admiralty Extension Act did not expressly or impliedly amend the Longshoremen's Act. Contemporaneously with its enactment, Congress amended the Longshoremen's Act (Public Law 757, June 24, 1948, 62 Stat. 602) and expressed no intention whatever of having the Admiralty Extension Act amend the Longshoremen's Act.

THIRDLY: The administrative interpretations of the Act have consistently construed it as not applying to injuries occurring on piers.

FOURTHLY: In House Report No. 2287 dated July 28, 1958, ten years after the enactment of the Admiralty Extension Act it was recognized that injuries on wharves and piers were not within the coverage of the Longshoremen's Act.

> "The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; 33 U. S. C. 901 *et seq.*), provides compensation for injuries suffered by longshoremen, ship repairmen, ship servicemen, and workers in related employment when they are working for private employers within the Federal maritime jurisdiction on the *navigable waters of the United States,* including drydocks. *These employees are subject to the protection of State safety standards when performing work on docks and in other shore areas.*" (Emphasis supplied.)

FIFTHLY: The language of the Extension Act itself does not support any argument that it was intended to make drastic amendments to the Longshoremen's Act. Proceedings under the Act are not brought *in rem* or in *personam;* damage to property is not a matter with which the Longshoremen's Act is concerned; and the Extension Act deals with tort liabilities to recover damages, a concept wholly

contrary to the purpose and intent of the Longshoremen's Act. Reliance on the Admiralty Extension Act as a basis for upholding the award of the Commissioner is misplaced and erroneous.

SIXTHLY: The decision of the Court of Appeals in this case is in conflict with the decision of this Court in *Smith & Son, Inc.* v. *Taylor*, 276 U. S. 179 (1928). No matter how it is attempted to distinguish the *Smith* case, the fact remains that it clearly held that the skid, identical with the device used in this case, was held to be an extension of the land.

For a comprehensive decision dealing with the non-application of the Admiralty Extension Act of 1948 to cases involving the Longshoremen's Act see *Johnson* v. *Traynor*, U. S. D. C. District of Maryland, Docket No. Adm. 4704, decided June 22, 1965, not yet reported, 34 Law Week 2001.

7. Section 20 of the Longshoremen's Act, 33 U. S. C. A. 920, has no application since a skid is a part of the wharf as a matter of law.

The Longshoremen's Act provides in Section 921 of Title 33 U. S. C. A. that a compensation order may be set aside if not in accordance with law. It is submitted that the award of the Deputy Commissioner in this case is not in accordance with law. In *Puget Sound Bridge & Dry Dock Company* v. *O'Leary*, 224 F. Supp. 557 (W. D. Wash., Decided Dec. 13, 1963) the Court made this comment at page 559:

> "Defendant contends that there is a presumption of coverage under Section 20 of the Act, 33 U. S. C. Sec. 920, which compels the court to sustain the compensation award. The court disagrees. Such pre-

sumption is inapplicable with regard to the question of jurisdiction, *Atlantic Stevedoring Company* v. *O'Keefe, supra; Alaska Airlines* v. *O'Leary* (W. D. Wash. 1963), 216 F. Supp. 540, but even assuming the presumption to be applicable, the conclusion of the Deputy Commissioner is overcome by substantial and convincing evidence and is patently erroneous."

CONCLUSION.

The skid is clearly a part of the pier to which it was securely and physically attached in order to increase its working area for loading and discharging cargo; it was not, like a gangway, used as a means of ingress to and egress from the vessel; the expansion of the Act to cover this new fact situation is unwarranted; the Admiralty Extension Act has not amended the Longshoremen's Act.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinion and Dissenting Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 326—September Term, 1964.

(Argued March 2, 1965 Decided April 5, 1965.)

Docket No. 29241

MICHIGAN MUTUAL LIABILITY CO., and
PITTSTON STEVEDORING CORP.,
Plaintiffs-Appellants,

v.

PHILLIP ARRIEN, Deputy Commissioner, Second Compensation District, Bureau of Employees Compensation, United States Department of Labor, and ISIDORO PARISI,
Defendants-Appellees.

LOCAL 1291, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, PHILADELPHIA,
Amicus Curiae.

Before:

MOORE, KAUFMAN and HAYS,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Palmieri, *J.*, entered upon an order granting defendants' motion for

summary judgment dismissing plaintiffs' complaint in an action to enjoin enforcement of an award pursuant to the Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C. §901, et seq.

Affirmed.

JAMES B. MAGNOR, of KIRLIN, CAMPBELL & KEATING, New York, N. Y. (CHARLES N. FIDLER, ALEXANDER P. GILLEN, on the brief), for plaintiffs-appellants.

ANGELO C. GUCCIARDO, of ISRAEL, ADLER, RONCA & GUCCIARDO, New York, N. Y., for defendant-appellee Parisi.

MORTON HOLLANDER, Department of Justice, Washington, D. C. (JOHN D. DOUGLAS, Assistant Attorney General; ROBERT M. MORGENTHAU, United States Attorney for the Southern District of New York; DAVID L. ROSE, Department of Justice, on the brief), for defendant-appellee Arrien.

ABRAHAM E. FREEDMAN and AVRAM G. ADLER, of FREEDMAN, BOROWSKY & LORRY, Philadelphia, Pa., for *amicus curiae*.

KAUFMAN, Circuit Judge:

The issue on this appeal is a narrow one—whether to set aside a compensation award to a stevedore, Isidoro Parisi, based upon an administrative finding that he was injured "upon the navigable waters of the United States" within the meaning and coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §903(a).

The employer, Pittston Stevedoring Corp., and its compensation underwriter, Michigan Mutual Liability Co., brought this action in the District Court against Parisi and

Arrien, the Deputy Commissioner of the Second Compensation District, Bureau of Employees Compensation, United States Department of Labor, seeking to enjoin enforcement of the award. 33 U. S. C. §921(b). Rejecting the contention that the injury giving rise to the claim was not covered by the Act, Judge Palmieri sustained the administrative determination. He granted the Deputy Commissioner's and Parisi's motion for summary judgment and denied plaintiffs' motion for the same relief. From the judgment entered on the Court's order, Pittston and Michigan Mutual appeal.

Although the legal precepts are sharply contested, the basic facts are undisputed. On September 4, 1963, Parisi, a longshoreman employed by Pittston, was helping discharge cargo from the S.S. *Copiapo* at a pier in Brooklyn, N. Y. To provide additional and adequate working space for greater efficiency, the workers set up a "skid"—a removable wooden, rectangular platform, approximately six feet by ten feet—extending over the waters between the vessel and the wharf. The skid was necessary because the wharf's narrow stringpiece did not extend far enough beyond the shed to permit the stevedores to walk around the unloaded pallets. Three angle irons secured the onshore side of the skid to the pier and cables shackled to two ring bolts on the offshore side were attached to stanchions on the pier shed. When not in use, the skid was easily dismantled and stored on the wharf. The surface of the skid and the stringpiece were about twenty to twenty-five feet below the deck and the skid was not used to board the vessel. A safety net or "saveall," loosely strung between the bulwark of the ship and the outer edge of the skid, served to catch any cargo that might fall.

Parisi was working on the skid when a pallet suspended from the *Copiapo's* cables broke, spilling a draft of cargo onto the skid and into the water. A bronze case struck Parisi's leg and knocked him into the water. Although saved from drowning by a fellow longshoreman, Parisi suf-

fered totally disabling injuries to his shoulder, head, leg and foot. Treating the accident as though it had occurred on land, Pittston and Michigan Mutual commenced paying the maximum rate of compensation under the New York Workmen's Compensation Law—$55. per week. And when Parisi filed a claim for compensation under the federal Longshoremen's Act, 33 U. S. C. §901, et seq., they asserted that his only remedy was under the State Act. But the Deputy Commissioner, after a hearing, concluded that the Longshoremen's Act applied because the injury "was sustained upon the navigable waters of the United States." He then entered an award for $70. per week—the maximum rate of compensation payable under the Longshoremen's Act—during the continuation of Parisi's temporary total disability plus a lump sum of $630. to cover, retroactively, the difference between $70. per week and the $55. paid weekly under the State Act.[1] This action, seeking judicial review of the administrative decision, followed.

I.

The 1927 Longshoremen's and Harbor Workers' Compensation Act, like most statutes, cannot be considered *in vacuo*, but must be understood in the context of the judicial history which led to its passage. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917), marks the genesis of that history. There, the Supreme Court concerned itself with the reach of a state compensation act, holding that such a statute could not be applied, constitutionally, to an injury suffered on a gangway running from a vessel on navigable waters to a pier. Considerations of uniformity, it said,

[1] The federal statute permits a maximum weekly recovery of $70., 33 U. S. C. §906(b), §908(b), with total benefits limited to $24,000, 33 U. S. C. §914(m). In contrast, the State Act provides a maximum weekly award of $55., with gross compensation for a temporary total disability limited to $6500. McKinney's Consolidated Laws of New York, Workmen's Compensation Law (1964 Cum. Supp.) §15.2.

required that jurisdiction to award compensation for such injuries be exclusively federal. Two successive Congressional attempts to allow the application of state law were struck down as improper delegations. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 (1920); *Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219 (1924). At the same time, however, *Jensen's* absolute rule was modified by the "maritime but local" doctrine, which provided that state jurisdiction could extend to maritime activities which were of local as opposed to national concern. See 76 Harv. L. Rev. 96 (1962).

In part because these decisions produced "no reliable determinant of valid state law coverage," *Calbeck* v. *Travelers Ins. Co.*, 370 U. S. 114, 118 (1962), Congress passed the Longshoremen's and Harbor Workers' Compensation Act in 1927. Section 3(a) of the Act provides that "compensation shall be payable . . . only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death . . . may not validly be provided by State law."

As we read the legislative history, the 1927 statute was intended to cover injuries incurred on temporary devices over navigable waters—such as skids or gangplanks. In this connection, it is pertinent that the Senate Judiciary Committee considering the Longshoremen's Act noted that

> injuries occurring in loading or unloading are not covered unless they occur on the ship or *between the wharf and the ship* so as to bring them within the maritime jurisdiction of the United States. Sen. Rep. 973, 69th Cong., 1st Sess., p. 16. (Emphasis added.)

The Act was designed to provide a federal compensation remedy for just that kind of injury where relief from the state might have seemed to be precluded by *Jensen*. *Cal-*

beck, supra, 370 U. S. at 120-22. On the other hand, injuries upon wharves or other extensions of land permanently covering navigable waters were not to be covered. See *Swanson* v. *Marra Bros.,* 328 U. S. 1, 7 (1946); cf. *Wiper* v. *Great Lakes Engineering Works,* 340 F. 2d 727 (6 Cir. 1965).

The problem put squarely to us here, therefore, is whether, with the beneficent purposes of the Longshoremen's Act and the reasons for drawing a federal-state dividing line in mind, a skid extending over navigable water resembles more closely a gangway—temporarily bridging the space between vessel and pier—or a pier permanently removing the underlying water from navigation. In resolving this, we should eschew exclusive reliance on spatial dissections which ignore the objectives of the Act, and beware of

> the dangers of a "jurisprudence of conceptions," . . . the extension of a maxim or a definition with relentless disregard of consequences to "a dryly logical extreme." . . . In such circumstances, . . . general maxims . . . framed alio intuitu . . . must be reformulated and readapted to meet exceptional conditions. *Hynes* v. *New York Central R. R.,* 231 N. Y. 229, 235-36 (1921) (Cardozo, *J.*).

We are persuaded that the temporary skid was not part of, and should not be analogized to, the wharf. A wharf or pier is usually built on pilings over what *was* navigable water. When the structure is completed, the water over which it is built is *permanently* removed from navigation as if the structure had been in the first instance built on land. In contrast, a skid like a gangplank is not a permanent structure and the waters under both are as navigable as they would be if a ship were moored in the same space and then sailed. See, e.g., *Boston Metals Co.* v. *O'Hearne,* 329 F. 2d 504 (4 Cir.), *cert. denied,* 379 U. S. 824 (1964);

cf. *Jeffers* v. *Foundation Co.*, 85 F. 2d 24, 25 (2 Cir. 1936). The skid occupied the position above the water only temporarily; it was removed from its space over the water and stored until needed again, much like a gangplank. Cf. *Hastings* v. *Mann*, 340 F. 2d 910, 911 (4 Cir. 1965), *petition for cert. filed*, 33 U. S. L. Week 3277 (U. S. Feb. 23, 1965). While a gangplank might be thought different from a skid because it is customarily ship's equipment, to make ownership the determinative factor is to resort to a wooden criterion inappropriate to a compensation scheme. And, it is interesting in this connection to note that the Longshoremen's Act was held to apply to an injury on a gangway *not* owned by or kept on the ship because it was "used to provide ingress to and egress from the vessel." See *Caldaro* v. *Baltimore & O. R.R.*, 166 F. Supp. 833, 836 (E. D. N. Y. 1956). The relevant inquiry, therefore, is not who owns the equipment but whether the injury occurred over and thus upon navigable waters.[2]

We believe *T. Smith & Son, Inc.* v. *Taylor*, 276 U. S. 179 (1928), inconclusive, as well as outdated, authority for the proposition that the skid must be considered an extension of land outside the reach of the Longshoremen's Act. In *Taylor*, a longshoreman was struck by a swinging sling while standing on a stage that rested solely upon a wharf and "projected a few feet over the water to or near the side of the vessel"; he was knocked off the stage into the water where sometime later he was found dead. The Court simply held that application of a state compensation statute did not encroach upon federal admiralty jurisdiction. Mr. Justice Butler understandably did not mention the Longshoremen's Act for the federal remedy was not yet effective. We do not question that the skid on which Parisi was injured was sufficiently connected with the land to sustain

[2] The broad federal compensation coverage is justifiable where, as here, the injury on the temporary protrusion over navigable waters is compounded by the risk of drowning; this risk is usually not present when the injury occurs on the pier.

an award under the State Compensation Act. But to concede this does not mean that a federal remedy is precluded; the Longshoremen's Act was intended to provide compensation for all injuries occurring upon navigable waters, "whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." *Calbeck, supra,* 370 U. S. at 117.[3]

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[3] Quite apart from the fact that "since the Supreme Court has claimed the field of maritime personal injury litigation as its own, lower court decisions have suffered from rapid technological obsolescence," Gilmore & Black, Admiralty 253 n. 12 (1957), we do not consider *Vega* v. *United States,* 86 F. Supp. 293 (S. D. N. Y. 1949), *aff'd per curiam,* 191 F. 2d 921 (2 Cir. 1951), *cert. denied,* 343 U. S. 909 (1952), controlling. Contrary to the dissent, we find no indication in the District Court's opinion that the platform on which the injury occurred protruded over the water, nor would we consider something "nailed and bolted" to the pier to be a "temporary fixture." In fact, the Court did not consider, as we must here, whether the injury was incurred "upon the navigable waters."

Moreover, we are not persuaded that ancient decisions fixing the limits of admiralty jurisdiction should be determinative when the issue is whether a Deputy Commissioner's conclusion that an injury occurred "upon the navigable waters," within the meaning of the Compensation Act, is contrary to the law. Indeed, the dissent's recognition that in enacting the 1927 Act Congress chose the phrase "upon the navigable waters," rather than "within the admiralty jurisdiction," suggest rejection, rather than adoption, of distinctions evolved in fixing the reach of the federal admiralty jurisdiction. And surely *Cleveland Term. & Valley R.R.* v. *Cleveland S.S. Co.,* 208 U. S. 316 (1908), and *The Troy,* 208 U. S. 321 (1909), holding that admiralty lacks jurisdiction of a claim for damages when a vessel strikes a bridge, should have no relevance in deciding whether a stevedore is entitled to compensation for a personal injury. See also *Baskin* v. *Industrial Accident Comm'n,* 338 U. S. 854 (1949), *vacating and remanding* 89 Cal. App. 2d 632, 201 P. 2d 549 (1949), and suggesting that the "twilight zone" concept of *Davis* v. *Department of Labor,* 317 U. S. 249 (1942), applies even where the earlier precedents are unequivocal. See Rodes, Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone, 68 Harv. L. Rev. 637, 642-43 (1955).

Nor does *Fredericks* v. *American Export Lines, Inc.,* 227 F. 2d 450 (2 Cir. 1955), preclude a holding that an injury on a temporary skid is covered by the Longshoremen's Act. There the Court held only that the seaworthiness warranty did not extend to a skid, not owned by the ship, because it was not ship's equipment.

II.

Our decision to uphold the award is also compelled by Section 20 of the Act, 33 U. S. C. §920, which provides that "in any proceeding for the enforcement of a claim for compensation . . . it shall be presumed, in the absence of substantial evidence to the contrary (a) that the claim comes within the provisions" of the Act. And, the Supreme Court's holding in *Davis* v. *Department of Labor,* 317 U. S. 249, 257 (1942) is quite in point. The Court informed us that the administrative determination that a case falls within the federal jurisdiction is "entitled to great weight and will be rejected only in cases of apparent error." We believe that our judicial function has been completed when, as here, it is evident that the Deputy Commission's choice is substantially rooted in the record evidence and is not contrary to law. *O'Leary* v. *Brown-Pacific-Maxon, Inc.,* 340 U. S. 504, 508 (1951); *Lumber Mutual Casualty Ins. Co.* v. *O'Keefe,* 217 F. 2d 720 (2 Cir. 1954). This principle was reaffirmed only a week ago when the Supreme Court upheld an award based upon a Deputy Commissioner's determination that an accident "arose out of and in the course of employment" within the meaning of the Longshoremen's Act. *O'Keefe* v. *Smith, Hinchmar & Grylis Associates, Inc.,* 33 U. S. L. Week 3320 (U. S. March 30, 1965). In reversing an appellate court judgment which overturned the award, the Court emphasized that the very narrow scope of judicial review "is in accord with the humanitarian nature of the Act"; "the inferences drawn by the Deputy Commissioner [even when the basic facts are stipulated]," the Court noted, "are to be accepted unless they are irrational or 'unsupported by substantial evidence on the record as a whole.' "

Furthermore, it is of some importance to note that *Calbeck, supra,* has been interpreted, in every appellate decision where the question has arisen, as mandating that a federal compensation award must be upheld if there is

a reasonable argument for coverage under the Longshoremen's Act. See *Interlake S.S. Co.* v. *Nielsen*, 338 F. 2d 879 (6 Cir. 1964), *petition for cert. filed*, 33 U. S. L. Week 3323 (U. S. March 30, 1965); *Boston Metals Co.* v. *O'Hearne*, 329 F. 2d 504 (4 Cir.), *cert. denied*, 379 U. S. 824 (1964); *Holland* v. *Harrison Bros. Dry Dock & Repair Yard, Inc.*, 306 F. 2d 369 (5 Cir. 1962). Thus, in *Boston Metals*, the injury occurred aboard a vessel deliberately but temporarily run aground in what was otherwise navigable waters; since the waters were not permanently removed from navigation, the federal award was sustained. And *Interlake* involved a ship-keeper killed when, in the course of checking the moorings of a vessel, he drove a car off the end of a wharf and crushed his skull on the frozen surface of Lake Erie, the Court there ruling that the injury occurred "upon the navigable waters" within the meaning of the Longshoremen's Act.[4]

We do not question the argument that the statutory presumption of coverage and the overlapping sanctioned by *Calbeck* create uncertainties and complexities. But this was recognized long ago when the Supreme Court noted that the boundaries are "undefined and undefinable with exact precision." *Davis, supra*, 317 U. S. at 255-56. It is too late to resort to simplistic, mechanistic formulas in the quixotic quest for a fixed line of demarcation, especially since such a goal, desirable though it may be, is not attainable in the developing and ever-changing maritime law. "Federal and state enactments have so accommodated themselves to the complexity and confusion introduced by the *Jensen* rulings," Mr. Justice Frankfurter once remarked, "that the resources of adjudication can no longer bring relief from

[4] In view of the reasons we have articulated for our holding we find it unnecessary to decide whether the award may also be sustained on the ground that the Admiralty Extension Act of 1948, 46 U. S. C. §740, enlarged the coverage of the Longshoremen's Act. Compare *Interlake, supra*, with *American Export Lines, Inc.* v. *Revel*, 266 F. 2d 82, 84 (4 Cir. 1959).

the difficulties which the judicial process itself brought into being." *Davis, supra,* 317 U. S. at 259 (concurring opinion).[5]

In any event, our reluctance to draw the equivalent of a Plimsoll line here imposes no great hardship upon the stevedoring industry which must, as a practical matter, insure under both state and federal acts. And the precedents from which such a line would be derived have only antiquarian value when viewed in the light of the "radical reconstruction" in maritime personal injury law that we have witnessed since 1940. See Gilmore & Black, Admiralty 253 (1957). The effort in every case should, rather, be to follow the Supreme Court's twice-voiced directive that the Longshoremen's Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Reed* v. *The Yaka,* 373 U. S. 410, 415 (1964); *Voris* v. *Eikel,* 346 U. S. 328, 333 (1953). Applied to this case, that policy compels us to sustain the Deputy Commissioner's award.

Affirmed.

HAYS, Circuit Judge (dissenting):

I dissent.

The decision of the court is contrary to decisions of the Supreme Court and of this court virtually identical in

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[5] The "twilight zone" concept articulated in *Davis, supra,* has been aptly described as "designed to include within a wide circle of doubt all water front cases involving aspects pertaining both to the land and the sea where a reasonable argument can be made either way." *Moore's Case,* 323 Mass. 162, 167, 80 N. E. 2d 478, 481, *aff'd sub nom. Bethlehem Steel Co.* v. *Moores,* 335 U. S. 874 (1948). It was even suggested, before the 1962 *Calbeck* decision, that the Supreme Court had abandoned any attempt to give effect to the statutory limitation in the Longshoremen's Act. "Such a departure could be justified," one law review writer noted, "on the ground that the statutory language was intended to insure benefits to certain workers, was responsive to a climate of judicial decision that no longer existed, and may be abandoned to the extent necessary to give effect to the underlying policy of the Act." Rodes, Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone, 68 Harv. L. Rev. 637, 646 (1955).

their factual setting. *T. Smith & Son, Inc.* v. *Taylor,* 276 U. S. 179 (1928); *Vega* v. *United States,* 191 F. 2d 921 (2d Cir. 1951), affirming *per curiam* 86 F. Supp. 293 (S. D. N. Y. 1949), cert. denied, 343 U. S. 909 (1952); *Jeffers* v. *Foundation Co.,* 85 F. 2d 24 (2d Cir. 1936).

Our problem is whether we draw the line separating land from navigable waters at one point or at another.[1] Any rule that we apply is necessarily arbitrary from the longshoremen's point of view because the boundary line between land and sea is crossed by a great deal of traffic and many injuries occur near the line. Accepting this situation, we should adhere to a rule as simple to understand and apply as possible:

Gilmore and Black state that:

> "Whether or not the injury occurred on navigable waters would be a trifle harder [than determining certain exclusions for Government employees], but that determination could be made in most cases

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[1] Longshoremen's and Harbor Workers' Compensation Act §3(a), 44 Stat. 1426 (1927), 33 U. S. C. §903(a) (1958):

> "Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. . . ."

In the case of *Calbeck* v. *Travelers Ins. Co.,* 370 U. S. 114 (1962), to which the majority opinion refers, the Supreme Court was not concerned with interpretation of the statutory phrase "an injury occurring upon the navigable waters of the United States," but with the construction of the words "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." For comment on the effect of *Calbeck,* see Gainsburgh and Fallon, *Calbeck* v. *Travelers Ins. Co.: The Twilight's Last Gleaming?,* 37 Tul. L. Rev. 79 (1962); *The Supreme Court—1961 Term,* 76 Harv. L. Rev. 75, 95-97 (1962); 48 Cornell L. Q. 532 (1963); 1963 Duke L. J. 327; 31 Fordham L. Rev. 398 (1962); 10 U. C. L. A. L. Rev. 1225 (1963).

> without too much toil and sweat (bearing in mind that while the dock is an extension of the land and not navigable waters, the gangway is an extension of the ship and is navigable waters)." Admiralty 339 (1957).

The simplest rule to apply is that suggested by the traditional law as set forth in Gilmore and Black: an extension of the land such as a pier is part of the land, and an extension of the ship, such as the gangway, is on navigable waters. By natural development from this rule an extension of the pier, such as the skid in the present case, is land.

The case of *Vega* v. *United States,* 191 F. 2d 921 (2d Cir. 1951), affirming *per curiam* 86 F. Supp. 293 (S. D. N. Y. 1949), cert denied 343 U. S. 909 (1952), is almost exactly on point. The injury in that case occurred upon a platform "eight to twelve inches above the level of the pier to which it was nailed and bolted." Not only did this platform overhang the water, as did the skid in this case, but it was a temporary fixture of the pier, upon which the ship's gangway rested, "built and maintained . . . to facilitate the ingress and egress of the employees engaged in the [ship's] conversion." 86 F. Supp. at 293. The district court dismissed the injured workman's claim. The court stated that:

> "The platform on which libellant slipped and fell was not a part of the [ship] . . . , nor attached to it. It was nailed and bolted to the pier. In contemplation of the law it is 'to be deemed an extension of the land.' Smith & Son v. Taylor, 276 U. S. 179, 182 [1928] . . . " 86 F. Supp. at 294.

On appeal, this court affirmed *per curiam,* without discussion of what must have seemed an obvious application of principles of maritime law.

In *T. Smith & Son, Inc.* v. *Taylor,* 276 U. S. 179 (1928), the death of a longshoreman was caused by his being knocked into the water from a stage that rested upon a wharf and that "projected a few feet over the water to or near the side of the vessel." 276 U. S. at 181. The Supreme Court held unanimously that the longshoreman's fatal injury "was given and took effect while deceased was upon the land." *Id.* at 182.

The facts on which this court based its decision in *Jeffers* v. *Foundation Co.,* 85 F. 2d 24 (1936), are also similar to the facts of the instant case. A workman was injured while working in a temporary cofferdam, used in laying the foundation for a bridge pier. The court stated that "a man injured while at work upon a pier or abutment, *even though that projects into navigable water,* is not within the 'general admiralty jurisdiction.' " *Id.* at 25. (Emphasis added.)

The fact that an injury occurred upon a structure which at times swung out over otherwise navigable waters did not persuade the Supreme Court in *The Troy,* 208 U. S. 321 (1908), that it should distinguish the case from that where an injury occurred on a stationary pier. *Cleveland Term. & Valley R.R.* v. *Cleveland S.S. Co.,* 208 U. S. 316 (1908).

Part II of the Court's opinion wisely eschews "simplistic, mechaninstic formulas in the quixotic quest for a fixed line of demarcation . . . in the developing and ever-changing maritime law." But what is to be said of the formula set out in Part I. i.e., that the statute applies because "a skid like a gangplank is not a permanent structure and the waters under both are as navigable as they would be if a ship were moored in the same space and then sailed"? By the very terms of the Act, "spatial dissections" must be made. The court's decision necessarily displaces as much land as is necessary to float the longshoreman's claim.

I am not aware of any newly discovered commercial or other exigencies which call upon us to extend jurisdiction

under the Act or to expand the protection of the Act to cover new fact situations. When Congress adopted the Admiralty Extension Act[2] it had an opportunity to expand federal compensation to cover all longshoremen's injuries caused in loading and unloading vessels. Congress did not take advantage of that opportunity. S. Rep. No. 1593, H. R. Rep. No. 1523, 80th Cong., 2d Sess. (1948), reprinted in [1948] 2 U. S. Code Cong. & Ad. News 1898; *American Export Lines, Inc.* v. *Revel,* 266 F. 2d 82, 84 (4th Cir. 1959). When Congress enacted the Longshoremen's Act in 1927, incorporating the phrase "upon the navigable waters," in preference to the phrase "within the admiralty jurisdiction,"[3] there was a conscious choice of adopting known distinctions based on the pre-existing admiralty decisions, rather than tying the scope of the Act to changing concepts of maritime jurisdiction.

The judicial task is one of interpreting the statutory phrase "upon the navigable waters" in the light of the congressional purpose in 1927 of supplementing state compensation acts where necessary. There is no need to create new and even more difficult distinctions in these already muddy waters.

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[2] 62 Stat. 496 (1948), 46 U. S. C. §740 (1958):

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land. . . ."

[3] S. 3170, 69th Cong., 1st Sess. §3 (1927), as originally drafted. See 370 U. S. at 122-24.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 344

MICHIGAN MUTUAL LIABILITY CO. AND PITTSTON STEVEDORING CORP., PETITIONERS

v.

PHILLIP F. ARRIEN, DEPUTY COMMISSIONER, AND ISIDORO PARISI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT ARRIEN IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1b–15b) is reported at 344 F. 2d 640. The opinion of the district court (App. 29a–44a) [1] is reported at 233 F. Supp. 496.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1965. Petitioners' timely petition for

[1] "App." references are to the Appendix to Appellants' Brief in the court of appeals. "Supp. App." references are to the Deputy Commissioner's Brief in the court of appeals.

rehearing was denied on April 29, 1965. The petition for a writ of certiorari was filed on July 13, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court and the court of appeals properly affirmed the Deputy Commissioner's determination that an injury sustained by a longshoreman engaged in unloading the cargo of a vessel while upon a platform temporarily extending over navigable waters was "an injury occurring upon the navigable waters of the United States" compensable under the Longshoremen's and Harbor Workers' Compensation Act.

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*, provides, in pertinent part:

> § 903 [Section 3 of the Act]. *Coverage.*
>
> (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *
>
> * * * * * *
>
> § 920 [Section 20 of the Act]. *Presumptions.*
>
> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

* * * * *

§ 921 [Section 21 of the Act]. *Review of compensation orders.*

* * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order * * *.

* * * * *

STATEMENT

The facts, as stated by the court of appeals (Pet. App. 3b–4b), were found by the Deputy Commissioner (App. 9a–11a) and are undisputed here.

The claimant, Isidoro Parisi, was employed as a longshoreman by the Pittston Stevedoring Corporation. On September 4, 1963, Parisi was engaged in discharging cargo from a vessel when a platform (called a "pallet") upon which cargo was being lowered by ship's equipment broke, causing the cargo to spill. Part of the cargo hit Parisi's leg, throwing him into the water. He was knocked unconscious and was saved from drowning by another longshoreman. Parisi received injuries to his shoulder, head, leg and foot, and, as a result of the accident, he has been temporarily totally disabled (Pet. App. 3b–4b).

When the accident occurred, Parisi was working upon a "skid," a removable rectangular wooden platform, approximately six feet by ten feet, attached between the wharf and the ship on a level some

twenty feet below the ship's deck (Pet. App. 3b). Such skids are used to give longshoremen additional space upon which to work in loading or unloading a vessel. The skid is removed and stored on the wharf when cargo is not being loaded or unloaded (Pet. App. 3b).

When in use, a skid is attached to the wharf by angle irons and, in many instances, by two overhead cables (App. 22a, 23a, 30a). On occasion, however, the cables are attached instead to the ship, so that the skid is supported by the ship (Supp. App. 3a). The skid upon which claimant was hit was fully supported by its attachments to the pier on the day in question. However, a safety net also ran from the skid to the ship's railing, so that the skid was physically attached to the vessel as well (Pet. App. 3b).

Parisi filed a claim for compensation under the Longshoremen's Act. The insurance carrier and the employer conceded that the injury occurred, denied that it was covered by the Act, and asserted that claimant's only remedy was under the New York Workmen's Compensation Act.[3] After finding the basic facts as set forth above, the Deputy Commissioner concluded that the claimant's "injury was sustained upon the navigable waters of the United States" and was thus covered by the Act (App. 9a–

[3] The maximum weekly recovery under the Longshoremen's Act is $70 a week (33 U.S.C. 906(b), 908(b)), with a limit of $24,000 (33 U.S.C. 914(m)), whereas the State statute prescribes a maximum of $55 a week for temporary total disability, not to exceed $6,500. McKinney's Consolidated Laws of New York, Workmen's Compensation Law (1964 Cum. Supp.) § 15.

11a). He entered an award ordering the employer and insurance carrier to pay claimant a lump sum of $630 (the difference between the $70 a week to which claimant was entitled under the Act and the $55 a week which had previously been paid him under the state act) plus $70 a week for the remainder of his temporary total disability (App. 11a–12a).

This action was brought by the insurance carrier and the employer in the district court under Section 21 of the Longshoremen's Act (33 U.S.C. 921, *supra*, p. 3), seeking judicial review of the administrative award on the ground that the injury was not sustained "upon the navigable waters of the United States" within the coverage of the Act. The district court affirmed the Deputy Commissioner's award and the court of appeals (Judge Hays dissenting) affirmed (Pet. App. 1b–15b). The court of appeals noted that, as a temporary device used to bridge the space over navigable waters between ship and wharf during unloading, a skid is similar to a gangplank, injuries on which are clearly covered by the Act.[3] It further noted that the legislative history of the Longshoremen's Act showed a purpose to cover injuries to longshoremen occurring in that area. The court also held that the Deputy Commissioner's award was sustainable under the statutory presumption of coverage (Sec. 20, *supra*, p. 2) as applied by this Court in *Davis* v. *Department of Labor*, 317 U.S. 249, and by the settled doctrine that the Longshoremen's Act should be liberally construed to avoid harsh results.

[3] A skid does not, however, provide a means by which passengers or crew may enter or leave the vessel.

ARGUMENT

The two decisions below upholding the Deputy Commissioner's compensation award are in accord with settled principles under the Longshoremen's Act. There is no conflict of decisions and no occasion for further review.

1. Section 3 of the Longshoremen's Act (33 U.S.C. 903, *supra*, p. 2) makes compensation applicable to injuries "occurring upon the navigable waters of the United States." This legislation was intended "to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 116, 117. With regard to the specific context of this case, the legislative history shows that the Act was intended to provide compensation for injuries to longshoremen engaged "in loading or unloading vessels" in the area "between the wharf and the vessels." S. Rep. 973, 69th Cong., 1st Sess., p. 16. As the courts below held, the injuries here seem clearly within this statutory purpose.[4]

Petitioners contend, however, that the "skid" upon which the accident here occurred should be treated as a part of the wharf itself, not as an area between the wharf and the vessel. The court of appeals re-

[4] While the decisions below did not rely upon it, the fact that the injuries here occurred in part through claimant's actually falling into navigable waters provides an additional basis for upholding the award. *Interlake S.S. Co.* v. *Nielsen*, 338 F. 2d 879 (C.A. 6), certiorari denied, June 1, 1965. No. 1017, O.T., 1964.

jected this characterization, sustaining the administrative finding that since the skid was attached to the wharf only temporarily, during loading or unloading, it was therefore more like a gangplank, injuries on which are deemed not to occur on the wharf but to be clearly within the area of the Act's coverage.[4a] In light of the temporary nature of the skid and its position as a bridge over navigable waters physically connected to the vessel as well as to the wharf, the Deputy Commissioner and the two courts below thus reasonably treated the skid as not constituting a portion of the wharf. In any event, such problems of case-by-case characterization are primarily for the administrator, who awarded compensation here. See *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504, 508; *O'Keefe* v. *Smith Associates,* 380 U.S. 359, 363–364.[5] They present no issue of general significance warranting review by this Court.

2. An independent basis for affirmance of the administrative award is presented by the statutory presump-

[4a] An injury upon a gangplank over navigable waters is the classic instance of an injury to a longshoreman exclusively within the admiralty jurisdiction. *E.g., Southern Pacific Co.* v. *Jensen,* 244 U.S. 205.

[5] Petitioner contends that the court below erred in relying upon the fact that a skid, like a gangplank but unlike a wharf, occupies space above waters only temporarily, and thus does not withdraw it from navigation, because an injury upon a bridge may occur over waters that are navigable, but not be covered by the Act (Pet. 10–11). An injury upon a bridge, however, is an injury upon something which is permanently an extension of land, and there never was any doubt that state law of its own force could provide compensation for such injuries. Accordingly, there was no occasion for Congress to provide a federal compensation remedy for such injuries.

tion of coverage contained in Section 20(a) of the Act (33 U.S.C. 920(a), supra, pp. 2–3). This Court ruled in *Davis* v. *Department of Labor*, 317 U.S. 249, 256–257, that a case, such as this one, where the injury shows connection with both the land and the navigable waters, falls within the "twilight zone" of overlapping State and federal remedies. In this zone, the statutory presumption requires affirmance of an administrative determination sustaining the employee's election of the federal rather than the state remedy. See also *Moorse's Case*, 323 Mass. 162, 167, 80 N.E. 2d 478, affirmed *sub nom. Bethlehem Steel Co.* v. *Moores*, 335 U.S. 874.[6]

3. Petitioners assert (Pet. 17) that the decision of the court of appeals is in conflict with *Smith & Son* v. *Taylor*, 276 U.S. 179. The issue in that case, which involved events occurring before the enactment of the Longshoremen's Act, was the award of state compensation benefits for a longshoreman struck by cargo while on a "stage that rested solely upon the wharf and projected a few feet over the water" and thrown into the navigable waters where he drowned. The employer conceded that the "stage" and wharf upon which the longshoreman was working were an extension of land.[7] This Court held that

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[6] Accord: *Avondale Marine Ways* v. *Henderson*, 346 U.S. 366; *Interlake S.S. Co.* v. *Nielsen*, 338 F. 2d 879 (C.A. 6), certiorari denied, June 1, 1965, No. 1017, O.T., 1964; *Boston Metals Co.* v. *O'Hearne*, 329 F. 2d 504 (C.A. 4), certiorari denied, 379 U.S. 824; *Holland* v. *Harrison Bros. Dry Dock and Repair Yard, Inc.*, 306 F. 2d 369 (C.A. 5). See also, *Hahn* v. *Ross Island Sand & Gravel Co.*, 358 U.S. 272. Compare *O'Leary* v. *Puget Sound Bridge Co.*, C.A. 9, No. 19273, decided July 29, 1965.

[7] 276 U.S. at 181–182.

the award of state compensation in those circumstances was constitutional, since the injury was not "exclusively within the admiralty jurisdiction." 276 U.S. at 182. Thus there is no conflict with the decisions below here for, while the fact that the skid here was physically supported by the wharf might have been sufficient to sustain the constitutionality of an award of benefits under a state workmen's compensation act, that does not preclude the employee's election of federal Longshoremen's Act benefits. *Calbeck* v. *Travelers Insurance Co., supra,* 370 U.S. at 116–117; *Davis* v. *Department of Labor, supra,* 317 U.S. at 256–258.[8]

4. Judge Hays' dissenting opinion expressed the view that a clear line must be drawn between land

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[8] This Court's decision in *Calbeck* makes it explicit that the Longshoremen's Act applies to injuries upon navigable waters "whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." Petitioners' contention (Pet. 13–14) that the decision in *Calbeck* was intended to eliminate the so-called twilight zone of overlapping compensation remedies and to restore "the federal compensation and state compensation acts to the status of being mutually exclusive rather than overlapping" is directly contrary to that express ruling.

Petitioners also assert (Pet. 12–13) that the decision below is incompatible with the Second Circuit's earlier decisions in *Vega* v. *United States*, 86 F. Supp. 293 (S.D. N.Y.), affirmed, 191 F. 2d 921 (C.A. 2), certiorari denied, 343 U.S. 909; and *Jeffers* v. *Foundation Co.*, 85 F. 2d 24 (C.A. 2). The reasoning of the *Jeffers* decision, however, emphasizes the permanent nature of the structure upon which the injury occurred and thus supports the result below. The *Vega* case involved a fixed platform and a libel for a maritime tort, not a claim for Longshoremen's Act compensation. The unanimous denial of petitioner's petition for rehearing *en banc* in the present case would, in any event, appear to rebut any assertions of an intra-circuit conflict.

and admiralty jurisdiction, and he found that such a line would require the exclusion of injuries upon a "skid" like the one in this case from the coverage of the Act (Pet. App. 11b–14b). As we have shown, however, *supra*, pp. 6–8, and as the majority held, the skid can and should be deemed to be within the admiralty jurisdiction when the employee elects the federal remedy. The premise upon which the dissent is based—that a clear line of demarcation between the admiralty and land jurisdictions must be developed—is incompatible with the legislative purpose recognized in *Davis* v. *Department of Labor*, 317 U.S. 249, to subordinate any desire for a clear line of demarcation to the overriding purpose of providing a speedy, inexpensive and certain remedy for work-connected injuries through affirmance of the employee's reasonable choice of remedies. *Id.* at 254, 256–257.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1965.

No. 344

MICHIGAN MUTUAL LIABILITY COMPANY, Insurance Carrier, and PITTSTON STEVEDORING CORPORATION, Employer,

Petitioners,

against

PHILIP F. ARRIEN, Deputy Commissioner Second Compensation District, Bureau of Employees Compensation, United States Department of Labor, and ISIDORO PARISI,

Respondents.

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS.

This reply brief is necessary in order to clarify the setting of this case and to clear up any misapprehensions the Court may have by reading respondent's brief, which obfuscates the important question of whether the determination was made "in accordance with law" by attempting, unfairly, to place this claim in the muddy waters of an isolated factual setting.

In stating the question presented, the respondent fails to note the important fact that the "platform temporarily extending over navigable waters" (p. 2)* was a platform the sole purpose of which was to extend the working area of the pier and in fact is a physical extension of the pier.

Both the Commissioner and the courts below clearly recognized that the skid served no other purpose. It was

* References are to pages of Respondent's brief.

not a gangway, nor was it a means of ingress to or egress from the vessel. (Compare definition of "gangway" and standards for "gangways" in safety and Health Regulations for Longshoring of the Department of Labor, 29 C. F. R. Part 1504 [Sub-part A 1504.3, (k) and Sub-part B 1504.11] referred to at page 5 of the petition).

Respondent also has resurrected the suggestion contained in the Commissioner's report that the save-all net running from the outboard side of the skid to the rail of the ship has significance, stating "so that the skid was physically attached to the vessel as well" (page 4). However, the respondent fails to inform the Court that this net was only loosely slung between the skid and the ship and its sole purpose was to catch cargo which might fall from the ship's tackle as cargo was being loaded or unloaded.

Moreover, the respondent fails to state that this save-all net is used on all occasions even where the stringpiece is wide enough so that a skid is not required. Yet, no one has ever suggested that because there is such a net between the wharf and the pier, that the pier thereby becomes an appurtenance of the ship. A loosely slung net is far less an attachment between the ship and the wharf than are the mooring lines which secure the ship to the wharf.

On page 4, the respondent makes the irrelevant and immaterial observation that "On occasions, however, the cables are attached instead to the ship, so that the skid is supported by the ship". Again the respondent fails to point out that this is done only when long steel beams and similar lengthy objects are being loaded into or discharged from a vessel. When operating with cargo of that type, the cables on the outboard side of the skid are attached to the ship so that these cables will not interfere with the handling of such cargo as would be the case if they ran to the stanchions on the pier. More importantly, no such cargo

operations were being performed at the time Parisi sustained his injuries.

The emphasis by respondent of the characterization of the Court of Appeals and by the Deputy Commissioner that the skid is a device used to "bridge" the space between the ship and the wharf, thereby likening it to a gangplank, is misplaced. The skid is not used as a bridge over navigable waters. Its sole purpose is to extend the working area of the narrow stringpiece. It is physically attached to the stringpiece and is just as necessary an appurtenance to the pier as is a wide stringpiece, where the use of a skid is not required. The misconception is urged to bolster the argument that the skid serves a purpose similar to a gangplank. A gangplank is an appurtenance which supplements the ship and is used solely as a means of ingress to and egress from the vessel. On the other hand, the skid or platform involved in this case is used for no other purpose than to extend the working area of the pier. It cannot be analogized to a gangplank.

The statement in respondent's brief (page 6) that there is no conflict in decisions is based on the argument indulged by the Court of Appeals that the cases directly in conflict with the present holding are obsolete, outdated and outmoded. No matter how the respondent attempts to distinguish *Smith & Sons, Inc.*, v. *Taylor*, 276 U. S. 179, case from the present case, the fact is that *Smith* held that a skid indentical with the one used in this case is an extension of the land.

Respondents argue strenuously that the legislative history compels a finding that Parisi's injury was one which occurred "between the wharf and the vessel" relying on Senate Report 973, 69th Congress, 1st Session, Page 16. But, what Congress meant was that an injury occurring on the working area of the pier—in this case a skid whose sole

purpose was to extend the pier's working area—was not an injury occurring between the wharf and the vessel.

The words in the Senate Report were intended to encompass an injury on a distinctively separate object, such as a raft or "camel" between the wharf and the vessel. Contrariwise, a physical extension of a pier or vessel is not "between the wharf and the vessel" even if it is removeable. A "skid" extending the area of the pier is an appurtenance of and an extension of the pier, while a gangplank is an appurtenance of and extension of the vessel and not an appurtenance of the pier.

The skid in this case was not a bridge "over navigable waters" and thereby "upon navigable waters" as the respondent argues. It was merely an extension of the pier.

To say that the words "upon navigable waters" are synonymous with the words "over navigable waters"* is to pervert the plain language of the Act.* There are bridges over navigable waters which permanently remove the waters beneath them from navigation when in their useful position, but which, when raised, permit full and complete navigation under them. Yet, no one has ever urged, nor does respondent, that an injury occurring upon such a bridge would be one occurring "upon the navigable waters".

Although it seems apparent that this Court in *Calbeck* v. *Travelers Insurance Company,* 370 U. S. 114 laid at rest the "twilight zone" and "local concern" concepts, the respondent urges that this court should revert to that outmoded theory in deciding this case. In the first place, this is not a "twilight zone" nor a "local concern" case. This is an injury occurring upon an extension of a wharf and thereby compensable only under the State Act.

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* The Act to which reference is made is the Longshoremen's and Harbor Workers' Compensation Act hereinafter referred to as LHWCA.

Davis v. *Department of Labor*, 317 U. S. 249 the parent of the "twilight zone" concept, has no application to the facts in the present case.

Davis dealt solely with the *status* of the injured employee. In *Davis* the injured man was working upon navigable waters on a barge and the sole question there was whether LHWCA contemplated that such a person working in dismantling a structure *over* navigable waters but injured *upon* navigable waters was one who was covered under the Act.

The respondent does admit that the courts below did not rely upon the "fact" that the injuries involved here occurred in part through claimant's actually falling into navigable waters. Nevertheless, it urges in footnote 4, page 6, that this is another ground for sustaining the decision of the Deputy Commissioner. Actually, there is no evidence to support this position. There was testimony that petitioner was saved from drowning but if that is the injury about which respondent is talking in footnote 4, that injury never occurred.

Finally, respondent in footnote 8, last sentence, page 9, states "the unanimous denial of the petition for re-hearing en banc in the present case would, in any event, appear to rebut any assertions of an intra-circuit conflict." The order of the Court of Appeals reads as follows: "No active Circuit Judge having requested that the case be heard en banc, the petition is denied". This plain language can hardly be called a unanimous denial.

Respectfully submitted,

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